(10)

No. 83-712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

v.

T.L.O., a Juvenile,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Was the decision of the New Jersey Supreme Court to suppress evidence illegally seized from respondent by her high school vice-principal based upon independent and adequate State grounds?

2. In the alternative, as a matter of federal law, is application of the exclusionary rule constitutionally required when the prosecution attempts to use the fruits of an illegal search by a public school official on its case-in-chief in a criminal matter?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New Jersey Constitution of 1947, Article I, paragraph 7.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

New Jersey Constitution of 1947, Article VIII, section 4, paragraph 1.

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

N.J. Stat. Ann. § 2A:4-60.

> All defenses available to an adult charged with a crime, offense or violation shall be available to a juvenile charged with committing an act of delinquency . . . the right to be secure from unreasonable searches and seizures . . . shall be applicable in cases arising under this act as in cases of persons charged with crime.

N.J. Stat. Ann. § 18A:25-2.

> A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess and on the playgrounds of the school and on the way to and from school . . .

N.J. Stat. Ann. § 18A:37-1.

> Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them.

N.J. Stat. Ann. § 18A:6-1.

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending

such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary: (1) to quell a disturbance, threatening physical injury to others; (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil; (3) for the purpose of self-defense; and (4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section . . .

N.J. Stat. Ann. § 18A:37-2(j)

. . . Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include. . . .

j. Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

STATEMENT OF THE CASE

On March 7, 1980, a search was made by Mr. Choplik, vice principal of Piscataway High School, of a purse belonging to T.L.O., a student at the school. Ms. Chen, a teacher, had made a routine check of the girls' restroom. She observed T.L.O. and another girl smoking tobacco cigarettes. (TS 20-7 to 25)[1] Although smoking by students was permitted in designated areas, it was not allowed in the restrooms. (TS 33-20 to TS 34-6) Ms. Chen accompanied both girls to Mr. Choplik's office, where she advised him of the infraction. (TS 21-1 to TS 22-23)

Upon being questioned, T.L.O. denied that she smoked. (TS 27-1 to 21) Mr. Choplik asked T.L.O. to give him her handbag because he wanted to see whether she had any cigarettes, which he believed would constitute proof that she had been smoking. (TS 31-1 to 13) When T.L.O. complied, Mr. Choplik

[1] "TS" designates the transcript of the hearing on the Motion to Suppress held on September 26, 1980. "T" refers to the transcript of the trial, conducted on March 23, 1981.

opened the purse and observed, "a package of Marlboros sitting right on the top there." (TS 28-3 to 11) As he removed the Marlboros, Mr. Choplik also observed cigarette rolling papers. He removed them, too. (TS 28-21 to TS 29-5) Mr. Choplik explained that "from then on I went to see what else was in there because from my experiences that seems to be a sign that someone is smoking marijuana." (TS 29-7 to 9)

Looking further into the handbag, he found a metal pipe, and one plastic bag containing tobacco or some similar substance.[2] (TS 29-10 to 16) He also found a wallet containing "a lot of singles and change," and inside a separate compartment of the purse, two letters and an index card. (TS 36-7 to 10; TS 38-6 to 12; TS 40-20 to 22; TS 39-4 to TS 49-11) Mr. Choplik then phoned T.L.O.'s mother, and the police. (TS 41-8 to 10)

Mr. Choplik admitted that T.L.O.'s purse was closed when she gave it to him and that he could not see inside until after he opened it. (TS 47-14 to 25) He also agreed that at the time Ms. Chen initially accused T.L.O. of smoking, he had a sufficient basis to impose a sanction without need for further evidence. (TS 47-9 to 13)

The local police transported T.L.O. and her mother to headquarters. Upon arrival, Officer O'Gurkins advised the juvenile of her *Miranda* rights. (T 20-7 to T 21-3) When Mrs. O. indicated that she wanted to have an attorney present during questioning, she was permitted to telephone the office of her lawyer. (T 34-10 to 24) He was not available, so the officer proceeded with the interrogation. According to Mrs. O., at no time did her daughter state that she had sold marijuana. (T 35-15 to 22)

Officer O'Gurkins admitted that although it was standard practice in juvenile matters to reduce incriminating state-

[2] At trial it was stipulated that the bag contained 5.40 grams of marijuana. (T 12-17 to 25)

ments to writing, he did not follow this procedure with T.L.O. (T 24-12 to 18) He nevertheless maintained that T.L.O. had confessed that she had been selling marijuana in school for a week. (T 22-2 to 17) He conceded that T.L.O. explained to him that the $40.98, which was found in her purse, constituted the proceeds from her paper route, which she had collected the night before.

On September 26, 1980, a motion was brought before the Honorable George J. Nicola, J.J.D.R.C., to suppress the evidence seized as a result of Mr. Choplik's search. The search was found by the Juvenile Court to be legal, and the motion was denied. *State in the Interest of T.L.O.*, 178 N.J. Super. 329, 342-45, 428 A.2d 1327 (J.D.R.C. 1980). After a trial held on March 23, 1981, T.L.O. was found guilty of possession of marijuana with intent to distribute. On January 8, 1982, a probationary term of one year was imposed.

An appeal as taken and decided on June 30, 1982. *State in the Interest of T.L.O.*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982). Two judges affirmed the denial of the motion to suppress the evidence secured by the search of the juvenile's purse, adopting the reasons set forth in the opinion of the trial court. However, they found that the record was inadequate to determine the sufficiency of the *Miranda* waiver which was allegedly made by the juvenile after her mother's unsuccessful attempt to summon counsel. *Id.*, 448 A.2d at 493. They therefore vacated the adjudication of delinquency and ordered a remand for further proceedings in light of the principles enunciated in *Edwards* v. *Arizona*, 451 U.S. 477, (1981) and *State* v. *Fussell*, 174 N.J. Super. 14 (App. Div. 1980). *Id.* One judge dissented, indicating that he would suppress the evidence found in T.L.O.'s purse because the search had been unreasonable. *Id.* at 495.

An appeal was taken to the New Jersey Supreme Court. On August 8, 1983, judgment was rendered ordering that the evidence seized from T.L.O. be suppressed. The court ruled that students are persons protected by both the United States

and the New Jersey Constitutions, and that the juvenile justice system must reflect the same fundamental fairness guaranteed to adult offenders. *State in the Interest of T.L.O.*, *supra*, 463 A.2d at 938. The argument that school officials be viewed as private persons acting *in loco parentis* was rejected; relying upon both federal and state case law, the court held that public school authorities are government officers. *Id.* at 939. It was further determined, citing to both decisions of the United States Supreme Court in administrative search cases, and to *N.J.S.A.* 2A:4-60 (which accords juveniles the right to be secure from unreasonable searches and seizures) that if an official search violates constitutional rights, the resulting evidence is not admissible in criminal proceedings. *Id.*

With regard to the standards governing such searches, it was decided that a warrant need not be secured. *Id.* at 940. After reviewing various New Jersey statutes regulating education, the court found that school officials have the power to conduct reasonable searches necessary to maintain safety, order and discipline within the schools. *Id.* at 940. Analogizing to the decision of "Our Court" with regard to administrative searches, it was held that school searches come within the "carefully defined" class of searches which can be conducted without a warrant. *Id.* at 939.

Recognizing that school officials do not act pursuant to the same responsibilities and motivations as police officers, the Court rejected the juvenile's contention that school searches could only be carried out on the basis of probable cause. Adopting the approach taken by a number of state and lower federal courts, the Court ruled that "when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interefere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence." *Id.* at 942.

Applying these principles to the facts surrounding the search of T.L.O., the New Jersey Supreme Court found that the principal did not have reasonable grounds to open her

purse. Since school policy allowed smoking in specially designated areas, and possession of cigarettes was not, therefore, a violation of school rules, Mr. Choplik had no reasonable grounds to believe that the student was concealing illegal substances in her purse. *Id.* at 942. The court further held that even if the initial opening of the purse had been reasonable, the subsequent "wholesale rummaging" of the student's letters and papers exceeded the proper scope of the search. *Id.* at 943.

Two judges dissented from the above decision finding that the assistant principal's search of T.L.O. was reasonable in light of all of the circumstances. *Id.* at 946.

SUMMARY OF ARGUMENT

Initially, respondent maintains that the judgment of the New Jersey Supreme Court was based upon independent and adequate state grounds, and that *certiorari* should be dismissed. Although the New Jersey court referred to federal law, the decision was also founded upon two provisions of the New Jersey Constitution (which guarantee the rights to be secure from unreasonable searches and seizures, and to receive a thorough and efficient education), and upon a New Jersey statute (which specifically grants to juveniles the right to be free of unreasonable searches). Because the decision is sufficiently and independently supported by state law, the outcome would remain the same even if the federal principles referred to therein should be modified. *Certiorari* must, therefore, be dismissed as this Court has no jurisdiction to issue advisory opinions.

Assuming *arguendo*, that the decision of the New Jersey Supreme Court does present a federal question for adjudication, petitioner's contention that the exclusionary rule need not be applied to the fruits of the illegal search at issue in this matter is clearly erroneous. The Fourth Amendment protects against unreasonable searches conducted by any governmental agency. Because public school personnel are employed by the state, act with state authority, and are responsible for carrying out state laws and regulations, their conduct constitutes governmental, rather than private, action. Thus the search of T.L.O. by the vice-principal comes within the ambit of the Fourth Amendment.

While petitioner is correct in asserting that this Court has not found the exclusionary rule to be constitutionally required in the case of every Fourth Amendment violation, those instances where it has not been applied have involved limited, peripheral uses of the evidence so obtained. This Court has not permitted the fruits of an illegal search to be introduced into evidence on the prosecution's case-in-chief in a criminal proceeding, as the State seeks to do in the present matter. In such circumstances, application of the rule is mandatory.

Even if petitioner is correct in maintaining that a balancing test—weighing the benefits of deterrence against the societal costs resulting from implementation of the rule—is constitutionally permissible to determine if the exclusionary rule should be applied in the present circumstances, it is clear that the expected benefits would outweigh the anticipated detriments. First, educators do have an interest in the successful prosecution of juvenile delinquency proceedings and would be deterred from conducting unreasonable searches by the knowledge that the resulting evidence would be excluded. Second, if evidence illegally secured by educators was not admissible at trial, the police would be deterred from instigating teachers to conduct illegal searches in order to provide otherwise unobtainable evidence on "a silver platter." With regard to societal costs, statistical studies have shown that relatively few prosecutions are dismissed because of Fourth Amendment problems. School surveys do not support the conclusion that the crime rate in schools is rising or that an increase in searches by school personnel would be a significant factor in reducing the present rate.

Petitioner has demonstrated no alternatives to the exclusionary rule which would effectively deter violations of the Fourth Amendment rights of students. In addition, the exclusionary rule serves constitutionally recognized purposes

other than deterrence; it protects the imperative of judicial integrity, and teaches respect for constitutional rights.

LEGAL ARGUMENT

POINT I

AS THE DECISION BELOW RESTED ON ADEQUATE AND INDEPENDENT STATE GROUNDS THIS COURT SHOULD DISMISS THE WRIT OF *CERTIORARI* AS IMPROVIDENTLY GRANTED.

Petitioner sought *certiorari* in this matter pursuant to 28 U.S.C. § 1257 which grants this Court jurisdiction when a "right privilege or immunity is . . . claimed under the Constititon" of the United States. The granting of a writ of *certiorari* does not, however, constitute a final disposition of the question of whether jurisdiction, in fact, exists for the case to be heard.

> [T]he initial decision to grant a petition for certiorari must necessarily be based on a limited appreciation of the issues in a case. . . . The Court does not, and indeed it cannot and should not try to, give the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits. *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 524, 527 (1957) (Frankfurter, J., dissenting).

As a threshold question, therefore, this Court must now determine if its jurisdiction has been properly invoked in this matter. *See University of California Regents* v. *Bakke*, 438 U.S. 265 (1978).

Article III of the Federal Constitution, the source of this Court's power, requires a live controversy between the parties to an action; the issuing of advisory opinions is not permitted. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945); *The Monrosa* v. *Carbon Black, Inc.*, 359 U.S. 180 (1959); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568 (1947). With regard to the decisions of state courts, this court has observed that:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

> And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.
> *Herb* v. *Pitcairn*, *supra*.

Thus where the decision of a state court rests upon both state and federal grounds, the jurisdiction of this Court fails if the state ground is independent of the federal and is adequate to support the judgment. *Id.*; *Fox Film Corp* v. *Muller*, 296 U.S. 207 (1935). If the state court would have reached the same result, regardless of federal law, considerations of federalism, and of the "case or controversy" requirement of Article III require that the state court's decision not be reexamined. *Enterprise Irrigation District* v. *Canal Co.*, 243 U.S. 157, 164 (1917).

The majority opinion in *Michigan* v. *Long*, ___ U.S. ___, 103 S.Ct. 3469 91983), decided last term, reaffirmed these principles even as it established more exacting criteria under which this Court would treat a state court decision as one based on state law. Jurisdiction would be found "in the absence of a plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 3478. The sufficiency and independence of the state ground must be apparent from the "four corners of the opinion." *Id.* at 3475.

In the instant matter, a review of the opinion below leads inescapably to the conclusion that the outcome rests upon independent state grounds, and would be unaffected by any modification of the federal constitutional considerations alluded to in the opinion. At the very outset, the New Jersey Supreme Court noted that, "young people and students are persons protected by the United States *and* New Jersey Constitutions." (emphasis supplied) *State in the Interest of T.L.O.*, *supra*, 463 A.2d at 938. Thus the court clearly signalled that the decision would have its roots in both state and federal constitutional principles. The adequacy and sufficiency of the

state ground was plainly evidenced by further statements in the decision.

First, the court rested its conclusion that the State cannot use evidence illegally seized from a student against her in a juvenile proceeding upon a provision of the New Jersey Code of Juvenile Justice [N.J. Stat. Ann. § 2A:4-60] which guarantees to juveniles the right to be secure from unreasonable searches. *State in the Interest of T.L.O., supra* at 939, n. 5. In concluding that suppression was required by this provision of state law, the New Jersey court also expressed its belief that the impropriety of so using evidence illegally obtained by public officials was settled, as a mater of federal constitutional law, by this Court's decision in *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); and *Michigan* v. *Tyler*, 436 U.S. 499 (1978). However, reference to parallel federal decisions does not, of itself, compel a determination that a decision is based entirely upon federal law; only if it appears that the "state court felt 'compelled by what it understood to be federal constititonal considerations to construe . . . its own law in the manner it did,' " [*Michigan* v. *Long*, *supra* 3478, quoting *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)] is the asserted sufficiency of the alternate state ground undermined. *Id.*

Here, the New Jersey court did not hold that because federal law demanded the suppression of evidence resulting from illegal searches of students by teachers, N.J. Stat. Ann. § 2A:4-60 must be construed to require this result; on the contrary, it said, "Our Code of Juvenile Justice buttresses this conclusion." Thus the existence of N.J. Stat. Ann. § 2A:4-60 provided support independent of federal law for the decision that the evidence must be suppressed. Given this mandate of New Jersey law as construed by the highest judicial tribunal of the state, it is clear that "the same judgment would be rendered by the state court," [*Michigan* v. *Long*, *supra*, at 3476 (quoting *Herb* v. *Pitcairn*, *supra* at 126)], even if this defendant were protected only by the provisions of the New Jersey Juvenile Justice Code, thus rendering an interpretation of the Federal Constitution "nothing more than an advisory opinion." *Id.*

The New Jersey Supreme Court, based upon its understanding of this Court's decision in *See* v. *Seattle*, *supra*, *Camara* v. *Municipal Court*, *supra*, and *Michigan* v. *Tyler*, *supra*, found the United States and State Constitutions to be equally protective of the rights of student to be free from unreasonable searches by school teachers. "In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate state ground of decision depriving this court of jurisdiction to review the state judgment." *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487, 491-92 (1965).

Furthermore in determining that educators are not private citizens, but governmental officials against whom the prohibition against unreasonable searches applies, the New Jersey Supreme Court cited both *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 637 (1943), and to *State in the Interest of G.C.*, 121 N.J. Super. 108, 114, 296 A.2d 102 (J.D.R.C. 1972), a prior New Jersey decision involving a search of a student by a teacher. *State in the Interest of G.C.*, *supra*, in turn based its conclusion that teachers are government functionaries exclusively upon New Jersey civil case law. Consequently, even if this Court were to modify the federal constitutional principles underpinning *West Virginia Bd. of Ed.* v. *Barnette*, *supra*, the outcome in the instant matter would remain the same. Such a decision by this Court would, then, be purely advisory; the New Jersey courts would still be required by state law to hold that searches by school personnel amount to governmental action.

Furthermore, the New Jersey Supreme Court made explicit that its decision rested equally on state constitutional protections which have no federal analogue. The *T.L.O.* court concluded that "our approach represents the best way to vindicate each student's right to be free from unreasonable searches *and* to receive a thorough and efficient education." (emphasis supplied) *Id.* at 942. The right to a "thorough and efficient education" is guaranteed to all New Jersey children between the

ages of five and eighteen by Article VII, Section 4, paragraph 1 of the New Jersey Constitution (1947). The United States Constititon, as construed by this Court, has no such requirement. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). Moreover, the New Jersey Supreme Court does not merely pay lip service to state constitutional provisions as was the case in the state court decision in *Michigan* v. *Long*, *supra* at 3477. The court reviewed no less than seven statutory provisions[3] which involve New Jersey educators in the regulation of student conduct that interfaces with the criminal justice process. Based on this analysis, the court concluded that "[w]e are satisfied that the Legislative scheme for public education in New Jersey contemplates a narrow band of administrative searches to achieve educational purposes." *Id.* at 940.

Since the educational guarantees of Article VIII, section 4, paragraph 1, have no corollary in the Federal Constitution, the New Jersey Court's reliance upon this ground is surely independent of any federal constitutional considerations. Moreover, in construing the constitutional mandate of a "thorough and efficient" education and its statutory implements, the New Jersey Court has a wholly sufficient basis to rule that school

[3] N.J. Stat. Ann. § 18A:25-2 (West Supp. 1983) (disorderly conduct); N.J. Stat. Ann. § 18A:37-1 (West 1968) (submission of pupils to authority); N.J. Stat. Ann. § 18A:37-2(j) (West Supp. 1983) (school officials have power to suspend pupils for illegal possession or consumption of drugs and alcohol); N.J. Stat. Ann. § 18A:37-2.1 (West Supp. 1983) (assaulting teachers); N.J. Stat. Ann. § 18A:37-2 and N.J. Stat. Ann. § 18A:37-4 (West Supp. 1983) (suspension of students for good cause); N.J. Stat. Ann. § 18A:40-4.1 (West Supp. 1983) (role of principal when student abused drugs or alcohol); N.J. Stat. Ann. § 18A:35-4a (West Supp. 1983) (board of education shall establish policies and procedures for evaluating and treating alcohol users); and N.J. Stat. Ann. § 18A:6-1 (west 1968) (empowering teachers to seize weapons and quell disturbances).

children cannot be harassed by official searches except under certain narrowly limited circumstances.

Additionally, the *T.L.O.* decision is also rooted in Article I, paragraph 7 of the New Jersey Constitution (1947), which protects against unreasonable searches and seizures. For example, in deciding that a school official need not apply for a warrant, the New Jersey court cited two New Jersey cases in support of this proposition: *State* v. *Patino*, 83 N.J. 1, 414 A.2d 1327 (1980), and *State* v. *Bruzzese*, 94 N.J. 210, 463 A. 2d 320 (1983). *State in the Interest of T.L.O.*, *supra* at 939. Both of these cases specifically rely upon Article I, paragraph 7 of the State Constitution. Similarly, with regard to the standard by which the legality of school searches must be evaluated, the New Jersey court referred to several federal cases, but also relied upon *In re Martin*, 90 N.J. 295, 447 A.2d 1290 (1982), a case involving the reasonableness of administrative inspections of gambling casinos, decided pursuant to both the State and Federal Constititons. *State in the Interest of T.L.O.*, *supra* at 941.

Although Article I, paragraph 7 of the New Jersey Constitution (1947), uses the same language as the Fourth Amendment, the New Jersey Supreme Court has frequently construed the state provision as guaranteeing more expansive protections. See *e.g.*, *State* v. *Alston*, 88 N.J. 211, 440 A.2d 1311, 1319 (1981) (finding that under the State Constitution a person's ownership of or possessory interest in property confers standing for search and seizure purposes, despite *Rakas* v. *Illinois*, 439 U.S. 128 (1978)); *State* v. *Johnson*, 68 N.J. 349, 346 A.2d 66, 67-68 (1975) (holding that under the State Constitution, if the prosecution wants to assert that a search was made pursuant to consent, the state has the burden of showing that defendant knew he could refuse; *contra Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973)); *State* v. *Hunt*, 91 N.J. 338, 450 A.2d 952 (1972) (requiring that under the State Constitution a warrant must be obtained to secure an individual's billing records from the telephone company, despite the decision in *Smith* v. *Maryland*, 442 U.S. 735 (1979) that a telephone user

has no Fourth Amendment expectation of privacy in phone company records.) Indeed had this case been decided in the New Jersey courts solely on federal constitutional grounds it is doubtful that the court would have even reached the issue of reasonableness in evaluating the search conducted in *T.L.O.* For, the facts of *T.L.O.* suggest that a "consent" cognizable under federal, but not New Jersey, law had been granted by the student whose purse was searched.[4] *State in the Interest of T.L.O., supra* at 940.

Furthermore, New Jersey has not been reticent in finding that provisions of its State Constitution and statutes extend greater protection than do equivalent provisions of the United States Constitution. "[S]tate constitutions exist as a cognate source of individual freedoms and . . . state constitutional guarantees of these rights may indeed surpass the guarantees of the federal constitution." *State* v. *Schmid*, 84 N.J. 535, 553, 423 A.2d 615 (1980). *See e.g., Right to Choose* v. *Byrne*, 91 N.J. 287, 450 A.2d 925 (1982) (enhanced equal protection accorded individual right to health and privacy; *contra Harris* v. *McRae*, 448 U.S. 297 (1980)); *State* v. *Schmid*, 84 N.J. 535, 553, 423 A.2d 615 (1980) (right of free speech on private university campus); *Peper* v. *Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 79 389 A.2d 465 (1978) (sex based presumptions may not be used to deny women employment rights equal to those accorded men); *State* v. *Saunders*, 75 N.J. 200, 216, 217, 381 A.2d 333 (1977) (right of sexual privacy; *but cf. Doe* v. *Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (D.C. Cir.), aff'd 425 U.S. 901, reh. den. 425 U.S. 985 (1976)); *Taxpayers Assn. of Weymouth Tp.* v. *Weymouth Tp.*, 80 N.J.

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[4] *See also State in the Interest of T.L.O.*, 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980). T.L.O. had handed her purse to the vice-principal upon his request. The New Jersey courts relying on *State* v. *Johnson*, 68 N.J. 349, 346 A.2d 66 (1975) held that any consent by the juvenile was ineffective because she had not been told of her right to withhold consent. *But cf. Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

6, 43, 364 A.2d 1016 (1976) (equal protection standard requires real and substantial relationship between the classification an the governmental purpose which is purportedly served, *but cf. Dandridge* v. *Williams*, 397 U.S. 481, 485 (1970)); *In re Quinlan*, 70 N.J. 10, 19, 40-41, 51 355 A.2d 647 (1976), *cert.* den. *sub. nom. Garger* v. *New Jersey*, 429 U.S. 922 (1976) (right of choice to terminate life support systems as aspect of right of privacy); *So. Burl. Cty. N.A.A.C.P.* v. *Tp. of Mt. Laurel*, 67 N.J. 151, 175, 336 A.2d 713, *cert.* den. and appeal dismissed, 423 U.S. 808 (1975) (zoning obligation of municipalities to provide housing opportunities for lower income groups); *State* v. *Gregory*, 66 N.J. 510, 513-514, 333 A.2d 257 (1975) (expansion of the double jeopardy protection to requre joinder of known offenses based on same conduct or arising from same criminal episode); *Robinson* v. *Cahill*, 62 M.J. 473, 482, 509, 303 A.2d 273 (1973) *cert.* den *sub. nom., Dickey* v. *Robinson*, 414 U.S. 976 (1973) (equal protection accorded right to an education); *Worden* v. *Mercer County Bd. of Elections*, 61 N.J. 325, 345346, 294 A.2d 233 (1972) (college students entitled to vote in their college communities and may not be subjected to additional questioning). Thus, even a cursory review of New Jersey case law reveals an extensive and bona fide pattern of reliance upon the State Constitution for greater protections than mandated.

Respondent therefore maintains that since the decision below rests on independent and adequate state grounds and the outcome of this case would remain the same regardless of any changes in federal law, *certiorari* must be dismissed.

POINT II

THE FOURTH AMENDMENT EXCLUSIONARY RULE IS CONSTITUTIONALLY MANDATED WHEN THE STATE ATTEMPTS TO USE ON ITS CASE-IN-CHIEF EVIDENCE ILLEGALLY SEIZED FROM A STUDENT BY PUBLIC SCHOOL PERSONNEL.

This case arises from the prosecution's attempt to use evidence illegally seized from T.L.O., a high school student, to directly prove her guilt of a criminal charge in a court proceed-

ing. Petitioner makes no attempt to demonstrate that the search was legal, but argues instead that when, as here, an illegal search is conducted by a school employee rather than a police officer, the Fourth Amendment exclusionary rule need not be applied. This contention is without legal or factual support. Since school employees are government agents, their actions are subject to the Fourth Amendment. Moreover, when evidence illegally obtained by government action is sought to be introduced on the prosecution's case-in-chief, application of the exclusionary rule is constitutionally mandated.

A. Searches Conducted By School Personnel Constitute Governmental Rather Than Private Action And Are Therefore Subject To The Fourth Amendment

The safeguards provided by the Constitution are not limited to adult citizens. *In re Winship*, 397 U.S. 358 (1979); *In Re Gault*, 387 U.S. 1 (1967). As was stated in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969):

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

On numerous occasions, albeit in other contexts, it has been decided by this Court that students do not "shed their constitutional rights . . . at the schoolhouse gate" [Id. at 506], and that conduct by school officials in derogation of these rights amounts to government action. *Id.*, at 506-07; *Island Trees Union Free School District No. 26 Board of Education* v. *Pico*, 457 U.S. 853 (1982); *Goss* v. *Lopez*, 419 U.S. 565 (1975); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

Admittedly, with regard to the question of whether school personnel are government agents in the specific context of the

Fourth Amendment, this Court has thus far made no ruling. However, the great majority of lower federal, and state courts which have considered this question have concluded, as did the Supreme Court of New Jewsey below, that searches of students by school employees constitute governmental action and come within the ambit of the Fourth Amendment.[5]

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[5] *Horton* v. *Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982), *cert.* den. ___ U.S. ___, 103 S.Ct. 3536 (1983); *M. M.* v. *Anker*, 607 F.2d 588 (2nd Cir. 1979); *Jones* v. *Latexo Independent School District*, 499 F.Supp. 223 (E.D. Tex. 1980); *Bilbrey* v. *Brown*, 481 F.Supp. 26 (D. Or. 1979); *Doe* v. *Renfrew*, 475 F.Supp. 1012 (N.D. Ind. 1979), mod. 631 F.2d 91 (7th Cir. 1980), reh. den. 635 F.2d 582 (7th Cir. 1980), *cert.* den. 451 U.S. 1022 (1980); *Bellnier* v. *Lund*, 438 F.Supp. 47 (N.D.N.Y. 1977); *M.* v. *Board of Education Ball-Chatham Community Unit School District No. 5*, 529 F.Supp. 288 (S.D. Ill. 1977); *Picha* v. *Wielgos*, 410 F.Supp. 1214 (W.D. Ill. 1976); *Smyth* v. *Lubbers*, 398 F.Supp. 777, 7876 (W.D. Mich. 1975); *United States* v. *Coles*, 302 F.Supp. 99 (N.D. Me. 1969); *In re W.*, 29 Cal. App. 3d 377, 105 Cal. Rptr. 775 (D. Ct. App. 1973); *In re C.*, 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (D. Ct. App. 1976); *State* v. *Baccino*, 282 A.2d 869 (Del. Super. 1971); *State* v. *F.W.E.*, 360 So. 2d 148 (Fla. D.Ct. App. 1978); *State* v. *Young*, 234 Ga. 488, 216 S.E. 2d 586 (1975), *cert.* den. 423 U.S. 1039 (1975); *State in the Interest of J.A.*, 85 Ill. App. 3d 567, 406 N.W. 2d 958 (App. Ct. 1980); *State* v. *Mora*, 307 So. 2d 317 (La. 1975), vac. 423 U.S. 309 (1975), remand 330 So.2d 900 (La. 1976); *People* v. *Ward*, 62 Mich. App. 46, 233 N.W. 2d 180 (App. Ct. 1975); *State in the Interest of T.L.O.*, *supra*, 463 A. 2d at 939; *Doe* v. *State*, 88 N.M. 347, 540 P.2d 827 (Sup. Ct. 1975); *People* v. *Singletary*, 37 N.Y. 2d 310, 372 N.Y.S. 2d 68 (Ct. App. 1975); *People* v. *Scott D.*, 34 N.Y. 2d 483, 358 N.Y.S. 2d 403 (Ct. App. 1974); *People* v. *Jackson*, 65 Misc. 2d 909, 319 N.Y.S. 2d 731 (App. Term. 1st Dept. 1971), aff'd 30 N.Y. 2d 734, 333 N.Y.S. 2d 167 (Ct. App. 1972); *State* v. *Wingerd*, 40 Ohio App. 2d 236, 318 N.E. 2d 866 (Ct. App. 1974); *State* v. *Walker*, 19 Or. App. 420, 528 P.2d 113, 115 (1974); *State* v. *McKinnon*, 88 Wash. 2d 75, 558 P.2d 781 (Sup. Ct. 1977); *Interest of L.L.*, 90 Wis. App. 2d 585, 280 N.W. 2d 343 (Ct. of App. 1979).

This conclusion is constitutionally required. It has long been recognized that while the Fourth Amendment has no application to conduct by private persons, it protects against invasion of privacy by any governmental agency. *Michigan* v. *Clifford*, ___ U.S. ___, 104 S.Ct. 641, 646 (1984); *Michigan* v. *Tyler*, 436 U.S. 499, 504-05 (1978); *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921); *Gouled* v. *United States*, 255 U.S. 298, 305 (1920); *Weeks* v. *United States*, 232 U.S. 383, 391-91 (1914); *Boyd* v. *United States*, 116 U.S. 524, 532 (1886). The definition of "governmental agent" has not been limited to the police:[6]

> The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara* v. *Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed. 2d 930, the "basic purpose of this Amendment . . . is to safeguard the privacy and security of indiviuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. *See* v. *City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311-313, 98 S.Ct. 1816, 1819-1821, 56 L.Ed. 2d 305. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.
> *Michigan* v. *Tyler*, *supra* at 504-05.

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[6] In point of historical fact, the Fourth Amendment developed in large part as a response to the Colonists' experiences not with the police, but with the regulatory agents designated to implement various parliamentary revenue measures. *Marshall* v. *Barlow's Inc.*, *supra* at 312. We do not know what the Framers' attitude would have been toward searches conducted by public school teachers, but as Chief Justice Burger has observed, "the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." *United States* v. *Chadwick*, 433 U.S. 1, 8-9 (1977).

Thus, the Fourth Amendment has been held to apply to "administrative" searches by such non-police governmental employees as building inspectors [*Camara* v. *Municipal Court*, *supra*]; firemen [*Michigan* v. *Tyler*, *supra*]; occupational health and safety inspectors [*Marshall* v. *Barlows, Inc.*, 436 U.S. 307 (1978)]; alcohol tax collectors [*Jones* v. *United States*, 357 U.S. 493 (1958)]; and border patrol officers [*United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976)]. None of these agents is primarily concerned with law enforcement; however, all are governmental employees, act with governmental authority, and are charged with the implementation of laws and regulations.

Similarly, it has been held that school personnel are government agents for Fourth Amendment purposes because they are state employees who rely on state authority for their actions. *See e.g.*, *Interest of L.L.*, *supra*, 280 N.W. 2d at 347; *People* v. *Scott D.*, *supra*, 358 N.Y.S. 2d at 405; *In the Interest of J.A.*, *supra*, 406 N.E. 2d at 960; *State* v. *Walker*, *supra*, 528 P.2d at 115-16; *State* v. *Baccino*, *supra*, 282 A.2d at 871; Comment, *Students and The Fourth Amendment: "The Torturable Class,"* 16 U.C.D.L. Rev. 709, 713-14 (1983) (hereinafter *The Torturable Class*). State regulation of teachers is pervasive, and boards of education are statutorily obligated to indemnify teachers in civil actions arising from their employment. *Bellnier* v. *Lund*, *supra* at 51.

State action has also been found because school authorities are responsible for enforcing numerous laws and regulations related to education. *State* v. *Mora*, *supra*, 307 So. 2d at 319. For example, some courts have noted that school attendance is compulsory, and school authorities are responsible for enforcing compliance with this legal mandate. See *e.g.*, *Bellnier* v. *Lund*, *supra* at 51; *D.R.C.* v. *State*, 646 P. 2d 252, 255 (Alas. Ct. App. 1982); *Horton* v. *Goose Creek Ind. School Dist.*, *supra* at 480.

Others have focused on the fact that educators have substantial regulatory duties with regard to the maintenance of a safe and orderly educational environment. *See e.g.*, *Horton* v. *Goose Creek Ind. School Dist.*, *supra*; *Doe* v. *Renfrew*, *supra*, 475 F. Supp. at 1020; *Interest of L.L.*, *supra*; *State* v. *Baccino*, *supra* at 871; *People* v. *Jackson*, *supra*, 319 N.Y.S. 2d at 733. Certainly a review of state statutes would support this conclusion. In some states, educators have a statutorily imposed duty to maintain good order and discipline in the school.[7] Others, including New Jersey, require teachers to enforce order in school and to hold students strictly accountable for any disorderly conduct.[8]

In many states, the prescribed duties of school employees are more specifically oriented toward law enforcement. A number require teachers and administrators to report evidence or incidents of crime to the police.[9] In Alabama, a school employee who fails to make such a report is himself/herself guilty of a Class C misdemeanor. Ala. Code § 16-1-24 (Supp. 1983). Similarly, teachers in Mississippi and Rhode Island commit misdemeanors if they allow students to possess weapons on school grounds [Miss. Code Ann. § 973717 (1973)], or permit any act which injures, or frightens, any person attend-

[7] *See e.g.*, Fla. Sta. Ann. § 232.27 (1981); Ind. Code § 0-8.1-5-2 (Burns. Supp. 1983); N.C. Gen. Stat. § 115C-307 (Supp. 1981); N.M. Stat. Ann. § 22-10-5 (1978); Wash. Rev. Code Ann. § 28A.27.010 (1982).

[8] *See e.g.*, Ariz. Rev. Stat. Ann. § 15-201 (1975); Ark. Stat. Ann. § 80-1629.2 (1980); Ky. Rev. Stat. Ann. § 161.180 (1980); La. Rev. Stat. Ann. § 17:416 (West Supp. 1983); Mont. Code Ann. § 20-4-302 (1983); Nev. Rev. Stat. § 391.270 (1979); N.J. Stat. Ann. § 18A:25-2 (West Supp. 1983).

[9] *See e.g.*, Cal. Educ. Code § 48909 (West 1978); Conn. Gen. Stat. Ann. § 10-233g(b) (West Supp. 1983); Hawaii Rev. Stat. § 296-71 (Supp. 1982); Ill. Ann. Stat. ch. 122 § 10-21.7 (Smith-Hurd Supp. 1982); Tenn. Code Ann. § 49-9-410.

ing the institution, respectively. R.I. Gen. Laws 11-21-2 (1981).

The fact that school personnel are state employees, and act with state authority to implement state laws and regulations governing education, compels the conclusion that they are governmental agents rather than private citizens for Fourth Amendment purposes.

1. The Doctrine Of *In Loco Parentis* Does Not Support The Conclusion That A Search Conducted By School Personnel Is Private Rather Than Governmental Action

As petitioner correctly notes [Brief of Petitioner at 8, n. 3], a few state courts have held that school authorities stand *in loco parentis* to students, and as would be the case with parents, their conduct constitutes private rather than governmental action for Fourth Amendment purposes. *See In re G.*, 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (D. Ct. App. 1970); *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (D. Ct. App. 1969); *People* v. *Stewart*, 63 Misc. 2d 601, 313 N.Y.S. 2d 253 (N.Y. Crim. Ct. 1970); *Commonwealth* v. *Dingfelt*, 227 Pa. Super. 380, 323 A. 2d 145 (Super. Ct. 1974); *Mercer* v. *State*, 450 S.W. 2d 715 (Tex. Civ. App. 1970).[10] This holding has not been adopted by the great majority of lower courts which have considered this question [See Point IIA, Note 5, *supra*], and is, in the context of our contemporary system of public education, completely unfounded.

The advent of modern compulsory education laws has eroded the factual support which once existed for finding that educators stand *in loco parentis* to their students. *See e.g.*, *Horton* v.

[10] In light of subsequent decisions finding school employees to be government agents for Fourth Amendment purposes, the continued validity of the California and New York cases referred to by petitioner is questionable. *Compare In re G.*, *supra* and *In re Donaldson*, *supra*, with *In re W.*, *supra* and *In re C.*, *supra*. *Compare People* v. *Stewart*, *supra* with *People* v. *Scott D.*, *supra* and *People* v. *Jackson*, *supra*.

Goose Creek Ind. School Dist., *supra* at 229-30; *D.R.C.* v. *State*, *supra* at 255. At common law, the *in loco parentis* power was based on two premises: The parent specifically delegated his authority to the teacher, and the authority so delegated was limited only to such restraint and correction as was necessary to carry out the educational purposes for which the teacher was employed. Blackstone, 1 *Commentaries* 453, as cited by *Reder* at 530. *D.R.C.* v. *State*, *supra* at 255. Under our present educational system, these conditions no longer exist.

It can hardly be said that parents have voluntarily delegated their authority to the school system. *Id.* Certainly teachers no longer act as agents of the parents, bound by the same parental concerns. *Id.* As the Supreme Court of New Jersey noted with regard to this aspect of the *in loco parentis* doctrine, "[j]udges and commentators have not failed to detect the irony of this analogy. They suggest that parents infrequently search their children and turn the evidence over to the police for prosecution." *State in the Interest of T.L.O.*, *supra* 463 A.2d at 938, n. 4. *Cf. In re Gault*, *supra* at 18. Moreover, modern teachers cannot exercise their disciplinary powers solely for the benefit of the individual child. *Reder*, *supra*; *D.R.C.* v. *State*, *supra*. Educators now have responsibility for safeguarding the entire student body, and the needs of the individual student may have to be sacrificed for the good of all *Id.*; *Buss* at 768.

This Court has, in other contexts, recognized that educators do not function as parent substitutes. *Tinker* v. *Des Moines*

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[11] The *in loco parentis* approach to the evaluation of school searches has also been severely criticized by commentators. *See e.g.*, *The Torturable Class*, *supra* at 714; Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L.Rev. 739, 768 (1974) (hereinafter *Buss*); Trosch, Williams and DeVore, *Public School Searches and the Fourth Amendment*, 5 J.L. & Educ. 41, 53 (1982); Reder, *School Officials' Authority to Search is Augmented by the In Loco Parentis Doctrine*, 5 Fla. St. U.L. Rev. 526, 531 (1977) (hereinafter *Reder*); Comment, *Students and the Fourth Amendment: Myth or Reality?* 45 U.M.K.C. L.Rev. 282, 296-97 (1977).

Ind. School Dist., *supra* at 507; *Ingraham* v. *Wright*, 430 U.S. 651 (1977); *West Virginia Bd. of Ed.* v. *Barnette*, *supra* at 637. It has been held that the authority possessed by the school, to prescribe and enforce standards of conduct is, unlike that of the parents, limited and "must be exercised consistently with other constitutional rights." *Goss* v. *Lopez*, *supra* at 574; *Tinker* v. *Des Moines Ind. Comm. Sch. Dist.*, *supra*; *Ingrham* v. *Wright*, *supra*.

The realities of contemporary public education compel the same conclusion in the instant matter. "What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct. As such it should be subjected to law enforcement rules." *Buss at 768. See also*, *Picha* v. *Wielgos*, *supra* at 1218; *Jones* v. *Latexo Ind. School Dist.*, *supra*; *State* v. *Baccino*, *supra*. As most lower courts have found, educators act as agents of the government, not of the parents of their students, and as such their conduct is subject to the Fourth Amendment. See note 5, *supra*.

B. The Exclusionary Rule Is Constitutionally Mandatory When The State Intends To Utilize Illegally Seized Evidence On Its Case-In-Chief In A Criminal Matter

Petitioner maintains that even if school personnel are governmental agents bound by Fourth Amendment principles, the exclusionary rule need not be applied when these principles are violated.[12] Of the many lower federal and state courts, previ-

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[12] *Amicus* New Jersey School Boards Associaion urges this Court to adopt a "good faith" exception to the exclusionary rule in the context of searches by school officials, an argument that was "not pressed or passed upon" in any court below. (*Amicus* Brief at 21-29). In *Illinois* v. *Gates*, ____ U.S. ____, 103 S.Ct. 2317 (1983), this Court refused to decide this precise issue, noting that because it had not been raised below, the factual record was likely to be inadequate. *Id.* at 2323. In addition, "due regard for the appropriate relationship of

ously cited, which have considered the school search issue, very few have adopted this approach. *See United Staes* v. *Coles*, *supra*; *Keene* v. *Rodgers*, *supra*; *D.R.C.* v. *State*, *supra*; *State* v. *Young*, *supra*; *State* v. *Wingerd*, *supra*. Nevertheless, petitioner argues that this minority view is consonant with the Fourth Amendment, and urges this Court to so hold.

The nature and purpose of the exclusionary rule have recently been the subject of some debate. Early decisions treated the rule as a constitutionally-mandated remedy for all Fourth Amendment violations. *Wecks* v. *United States*, 232 U.S. 383 (1941); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). As petitioner correctly notes, beginning with *United States* v. *Calandra*, 414 U.S. 338, 349 (1974), this Court has taken a somewhat different view, focusing primarily on the deterrent effect of the exclusionary rule, and applying it in "those areas where its remedial objectives are thought most efficaciously served." *See also Stone* v. *Powell*, 428 U.S. 465, 486-87 (1976). Based upon this change of emphasis, petitioner asserts that the exclusionary rule need only be applied when the benefits of deterrence are equal to, or outweighed by the costs to society inherent in excluding relevant evidence of criminal conduct. (Brief of Petitioner at 14).

However, those cases, cited by petitioner in support of this contention, where implementation of the rule has been restricted involve only limited peripheral uses of the illegally

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this Court to the state courts" required that the latter be given the first opportunity to rule on the question. *Id.* As the instant record is devoid of any facts pertaining to the good faith of the searching official, and as the New Jersey courts have been denied the opportunity to first rule on the question, the issue cannot be properly considered here. Moreover, since the standard governing school searches was well established in New Jersey at the time of the present incident, it is unlikely that objective good faith could be established. *See State in the Interest of G.C.*, 121 N.J. Super. 108, 296 A.2d 102 (J.D.R.C. 1972).

obtained evidence.[13] In these unusual circumstances, it was determined that suppression of the evidence would have so little deterrent effect that the costs of enforcing the exclusionary rule would outweigh the benefits. None entailed, as is true in the instant matter, the introduction of the illegally obtained evidence on the State's case-in-chief at a criminal proceeding.[14]

This Court has never undermined this core deterrent function of the rule; "the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *United States* v. *Calandra*, *supra* at 349. Indeed, in *United States* v. *Calandra*,

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[13] *See e.g.*, *United States* v. *Calandra*, *supra* (use of illegally obtained evidence permitted at a grand jury proceeding); *Walder* v. *United States*, 347 U.S. 62 (1954), and *United States* v. *Havens*, 446 U.S. 620 (1980) (prosecution allowed to use illegally obtained evidence to impeach credibility when defendant testified falsely at trial); *United States* v. *Janis*, 428 U.S. 433 (1976) (evidence secured illegally by state police admissible in civil suit brought by federal authorities to collect unreported taxes); *Stone* v. *Powell*, *supra* (refusal to consider on federal *habeas corpus* proceeding the failure of a state court on direct appeal to suppress evidence illegally obtained).

[14] Petitioner argues that juvenile delinquency proceedings are rehabilitative rather than criminal in nature, and that implementation of the exclusionary rule would frustrate this "ameliorative purpose." (Petitioner's Brief at 15, n. 9) However, this Court long ago rejected the contention that benevolent motivations could justify depriving juveniles of constitutional rights. *In re Gault*, *supra* at 18-19. "[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts"; a proceeding in which a juvenile could lose his liberty for years is the functional equivalent of a felony prosecution. *In re Winship*, *supra* at 367. Furthermore, many secondary school students are prosecuted criminally, either because they are legally adults or are subject to one of the various state statutes which allow prosecutors to try older juveniles as adults. *See e.g.*, *State* v. *Engerud*, 94 N.J. 331, 463 A.2d 934, 938 (1983).

Justice Powell, writing for the Court, reaffirmed the basic principle that evidence secured illegally "cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *Id.* at 347. Similarly, in *Stone* v. *Powell*, *supra* at 493-94, while declining to enforce the exclusionary rule on collateral review, Justice Powell once again emphasized the view that it must continue to be implemented at trial and on direct appeal. Cf. *United States* v. *Johnson*, 457 U.S. 537, 102 S.Ct. 2579 (1982).

In determining whether the exclusionary rule was applicable in a school disciplinary proceeding, the District Court of the Western District of Michigan noted that the decision in *Calandra* "was premised upon the availability of an exclusionary rule applicable to the authorities' case in chief . . ." *Smyth* v. *Lubbers*, *supra* at 794.

Moreover, the fact that the search at issue was conducted by other than a police officer has not produced a different result. Petitioner's assertions to the contrary not withstanding, this Court has never confined the exclusionary rule to searches conducted by law enforcement officers. "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal law or breaches of other statutory or regulatory standards." *Marshall* v. *Barlow's Inc.*, *supra* at 313. The exclusionary rule has been specifically applied to such non-police governmental officials as firemen [*Michigan* v. *Clifford*, *supra*]; alcohol tax agents [*Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970)]; border patrol officers [*United States* v. *Martinez-Fuerte*, *supra*].

The above governmental officers are not primarily concerned with the enforcement of criminal law. They are responsible for carrying out various statutory and regulatory schemes to promote health, safety, etc. Occasionally, as a result of the performance of their duties, non-criminal sanctions are imposed upon a violator; even more infrequently they discover evidence which results in a criminal prosecution.

Nevertheless, the exclusionary rule has been applied when their conduct in pursuit of their official responsibilities has been adjudged unreasonable by Fourth Amendment standards.

Similarly, school employees are charged with the responsibility of carrying out the legislative and administrative schemes formulated to promote public education. The enforcement of these regulations can result in the imposition of such quasi-criminal sanctions as suspension and expulsion upon student-violators; it can also result in the discovery of evidence upon which criminal charges are founded. As is the case with other governmental agents, the exclusionary rule is applicable when they exceed their authority.

Thus when, as in the instant case, the state attempts to utilize the fruits of an illegal search on its case-in-chief, the "cost-benefit" analysis proposed by appellant has no application. The exclusionary rule is constitutionally mandated even when the illegal search was conducted by government agents other than police officers.

C. Assuming *Arguendo* That The "Cost-Benefit" Test Proposed By Petitioner Is Appropriate In The Instant Case, Application Of The Exclusionary Rule Would Still Be Mandated Since The Expected Deterrence Benefits Would Outweigh Any Anticipated Detriments

Even assuming for the purposes of argument, that the "cost-benefit" approach were appropriate in this case, it is clear that the balance would weigh heavily in favor of the application of the exclusionary rule. The expected benefits with regard to the deterrence of conduct in violation of the Fourth Amendment would outweight any anticipated detriments.

1. Application Of The Exclusionary Rule To School Searches Would Deter Violations Of The Fourth Amendment Because School Officials Have A Strong Interest In Seeing Criminal Actions Against Students Successfully Litigated

Application of the exclusionary rule to searches of students would substantially deter conduct in violation of the Fourth Amendment because school administrators do, contrary to petitioner's contentions, have a strong interest in seeing juvenile delinquency proceedings successfully litigated.[15] Certainly, the primary concern of school administrators and teachers is education, not law enforcement. However, it has also been universally recognized that educators have an obligation to maintain a safe and orderly environment for the benefit of all students. *Tinker* v. *Des Moines Ind. Comm. Sch. Dist.*, *supra* at 507; *Doe* v. *Renfrew*, *supra*, 475 F. Supp. at 1020; *Moore* v. *Student Affairs Comm. of Troy State University*, 284 F. Supp. 725, 729 (M.D. Ala. 1968); 3 LaFave, *Search and Seizure*, 10.11 at 458 (1978).

As previously noted, in most states, educators have statutorily imposed duties to maintain orderly conditions in the school, or to hold students strictly accountable for disorderly

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[15] Petitioner also makes the surprising assertion that because school authorities infrequently conduct searches, they cannot be expected to learn the basic rules governing search and seizure, or to moderate their conduct accordingly. (Petitioner's Brief at 16). Initially, it is difficult to understand why, if school searches occur so infrequently, petitioner insists that they are indispensable to the maintenance of a safe and orderly educational environment.

In any event, there is no legal support for the position that individuals can be held accountable only for those laws with which they have day to day contact. Furthermore, teachers as a group are well-educated and academically talented. Familiarizing them with basic Fourth Amendment principles would certainly present no serious difficulties. Indeed many educators are themselves responsible for teaching constitutional principles to their own students through history and civics courses.

conduct; in some, educators are even obliged to seek out and report to the police evidence of criminal conduct. See Notes 7, 8, and 9, *supra*. These obligations would, at a minimum, concern teachers with the enforcement of school regulations that further these ends and with the elimination of anti-social conduct which in addition to violating school regulations also contravenes criminal law.

In light of these responsibilities, it is manifest that teachers and other school officials have, in addition to their educational functions, substantial regulatory and law enforcement duties. Educators who fail to successfully carry out these duties would be evaluated accordingly by their superiors, and might personally suffer such detriments as loss of job or of promotions.

To comply with these mandates, it would be necessary that anti-social or disruptive conduct be prevented or immediately abated. While these ends may on occasion be achieved through internal disciplinary procedures, the more drastic measure of arrest, trial and conviction in the juvenile justice system would often "solve" the discipline problem with a minimum of effort on the part of the school system. For example, a successful juvenile prosecution could result, by mean of a reformatory or other custodial disposition, in the removal of the disruptive student from the school environment entirely. Or the student and his family could be compelled, as a condition of probation, to submit to psychiatric or other remedial counselling which they might not otherwise have been willing to seek.

In many states, the fact of a juvenile delinquency adjudication is *per se* grounds for suspension or expulsion.[16] In other states, ground for expulsion or suspension include engaging in

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[16] *See e.g.*, Alaska Stat. § 14.30.045 (1982); Kan. Stat. Ann. § 72-8901 (1980); La. Rev. Stat. Ann. § 17:416 (West 1983); Mich. Comp. Laws. Ann. § 380.1311 (West Supp. 1981); Nev. Rev. Stat. § 115-391 (Supp. 1981).

activity forbidden by the penal code.[17] While such statutes may still necessitate the holding of some minimal due process hearing, certainly the fact of a juvenile delinquency adjudication would reduce the school's burden of proof to the production of a court document. The school system could thereby impose its own sanctions with a minimum of effort on its part.

Thus, school officials have a very direct interest in seeing juvenile prosecutions successfully concluded, and would therefore be deterred by the knowledge that illegally conducted searches will result in suppression of the evidence found. Certainly their interest is as strong as that of other regulatory, as opposed to law enforcement, agents to whom the exclusionary rule has already been applied.

Admittedly, building inspectors, revenue agents, firemen, like teachers, are not police officers, and do not primarily carry out searches with criminal law enforcement goals in mind. This difference has always been recognized by this Court and implemented not by elimination of the exclusionary sanction, but by adapting the conditions under which these species of search can be conducted. In so doing, the governmental interest which justifies the search has been balanced against the constitutionally protected interests of the citizen, and the nature and extent of the intrusion was appropriately limited. *Camara* v. *Municipal Court*, *supra* at 534-35. Thus, certain classes of administrative search have been authorized on the basis of standards less than probable cause. *Michigan* v. *Tyler*, *supra* at 507, n. 5. In some circumstances, the requirement of a warrant has been eliminated. *See e.g.*, *United States* v. *Martinez-Fuerte*, *supra* at 566-67. *See also Terry* v. *Ohio*, 392 U.S. 1 (1968).

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[17] *See e.g.*, Ind. Code Ann. § 20-8.1-5-4 (Burns Supp. 1983); Me. Rev. Stat. Ann. Tit. 20-A § 1001 (Supp. 1983); Neb. Rev. Stat. § 79-4, 180 (Supp. 1983); S.C. Code Ann. § 59-63-210 (Law Co-op. 1976).

This was the identical approach taken by the Supreme Court of New Jersey in the opinion below.[18] *State in the Interest of T.L.O.*, *supra* at 941-42. After considering such governmental concerns as the duty of educators to maintain order, safety, and discipline in the schools, the necessity of creating a proper

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[18] Since the New Jersey Supreme Court found the search in this case to be invalid even under the reasonable grounds test and petitioner has not challenged the propriety of this finding, the question of the proper standard to be applied is not strictly at issue here. Respondent argued below and still maintains that the diluted "reasonable grounds" standard is not constitutionally permissible in this case. While the administrative search analogy may have some validity when applied to inanimate objects such as lockers, it breaks down completely when, as here, the person of a child is the subject of a significant intrusion on privacy and dignity. *Horton* v. *Goose Creek Ind. School Dist.*, *supra* at 477. In creating the few, narrowly defined exceptions to the warrant-probable cause requirement, this Court has balanced the governmental interests at issue against the nature of the intrusion. *Terry* v. *Ohio*, *supra* at 20-31 (1968); *Camara* v. *Municipal Court*, *supra* at 536-37. Thus, the lesser standard was authorized for administrative searches because these inspections are not aimed at the discovery of crime, are not personal in nature, and entail a rather limited invasion of a citizen's privacy. *Camara* v. *Municipal Court*, *supra* at 535-37. Similarly, the frisk exception is allowed because the intrusion is limited to a "pat-down" for the discovery of weapons, when an officer reasonably believes that his safety is threatened. *Terry* v. *Ohio*, *supra* at 28-29.

However in the school setting, the lesser standard has been applied not only to searches related to school rule violations, but also for evidence of crime. Clearly, the probable cause standard cannot be diluted in these circumstances. See *Id.* at 20-21; *Camara* v. *Municipal Court*, *supra* at 535; *State* v. *McKinnon*, *supra* at 787 (dissent of Rosellini, A.J.). *State* v. *Young*, *supra*, 216 S.E. 2d at 599 (Gunter J., dissenting).

Moreover if a school rule infraction is to be validly analogized to a regulatory code violation, the scope of the search permitted should be similarly limited. Nevertheless, in the school context full body searches have been authorized not merely "a limited intrustion of the kind

educational atmosphere, the fact that educators are not primarily concerned with law enforcement, and the necessity for immediate action when threats to the educational environment arise, the New Jersey Supreme Court ruled that a warrant need not be procured, and that a search can validly be conducted if the teacher has reasonable grounds to believe that the student possesses evidence of illegal activity or of activity that would interfere with school discipline and order. *Id.* at 941-42.

The majority of lower federal and state courts, which have considered this issue have taken the same approach, dispensing with the warrant requirement and permitting searches upon a lesser standard akin to that formulated by the New Jersey Supreme Court.[19] By contrast, where the search of the

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associated with the relaxed standards of reasonableness in *Camara* and *Terry*." *State* v. *Young*, *supra* at 600. Furthermore, school attendance is compulsory. Unlike the citizen who has entered a highly regulated business, who has purchased an airline ticket, or who intends to cross an international border, it cannot be said that a student has surrendered his reasonable expectation of privacy by voluntarily placing himself in a situation where an administrative inspection is inevitable. *See Jones* v. *Latexo Ind. School Dist.*, *supra* at 234. Thus the administrative search analogy is not viable.

Admittedly, few courts have adopted the traditional probable cause standard when a search has been conducted by school personnel. *State* v. *Mora*, *supra*. *See also M. M.* v. *Anker*, *supra* at 589; *State* v. *Young*, *supra*, at 594 (Gunter, J., dissenting); *State* v. *McKinnon*, *supra*, 558 P.2d at 785 (Rosellini, A.J., dissenting). Respondent nevertheless submits that the dilution of the probable cause-warrant standard in the school context is in violation of the Constitution.

[19] *See e.g.*, *Horton* v. *Goose Creek Ind. School Dist.*, *supra*; *M. M.* v. *Anker*, *supra*; *Jones* v. *Latexo Ind. School Dist.*, *supra*; *Bilbrey* v. *Brown*, *supra*; *Bellnier* v. *Lund*, *supra*; *Doe* v. *Renfrew*, *supra*; *M.* v. *Board of Education Ball-Chatham, etc. Dist. No. 5*, *supra*; *In re W*, *supra*; *In re C.*, *supra*; *State* v. *Baccino*, *supra*; *State* v. *F.W.E.*,

student was conducted by the police rather than school employees, courts have consistently imposed the probable cause test.[20]

In concluding that this approach was adequate to protect both the legitimate interests of the state and the privacy rights of the students, these courts considered many of the same factors as were noted by the court in *State in the Interest of T.L.O.*, *supra*, as well as others which arise in the school search context. *See e.g.*, *In the Interest of J.A.*, *supra* at 962 (the health and welfare of the students in the school's charge); *Jones* v. *Latexo Ind. School Dist.*, *supra* at 236 ("the unique role of education in our society"); *State* v. *Baccino*, *supra* at 871, and *People* v. *Jackson*, *supra*, 319 N.Y.S. 2d at 734-35 (the *in loco parentis* relationship between teacher and student); *Doe* v. *State*, *supra*, 540 P.2d at 830 (the "epidemic" of crime in the schools); *People* v. *Scott D.*, *supra* at 406-08 (the "lethal" threat of drug abuse on the increase in schools; the immaturity of students). Thus the difference in the nature of the search has already been balanced and accommodated by the use of a standard less than probable cause; further amelioration by dispensing with the exclusionary rule would reduce the Fourth Amendment protection to an empty shell.

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supra; *People* v. *Ward*, *supra*; *Doe* v. *State*, *supra*; *State in the Interest of T.L.O.*, *supra*; *People* v. *Singletary*, *supra*; *People* v. *D.*, *supra*; *People* v. *Jackson*, *supra*; *State* v. *McKinnon*, *supra*; *In re L.L. supra*.

[20] *See e.g.*, *Piazzola* v. *Watkins*, 442 F.2d 284 (5th Cir. 1971); *Picha* v. *Wielgos*, 410 F.Supp. 1214 (N.D. Ill. 1975); *Waters* v. *United States*, 311 A.2d 385 (D.C. App. 1973); *M. J.* v. *State*, 399 So.2d 996 (Fla. Dist. Ct. App. 1981); *People* v. *Bowers*, 72 Misc. 2d 800, 339 N.Y.S. 2d 783 (N.Y.C. Crim. Ct. 1973), aff'd 77 Misc. 2d 697, 356 N.Y.S. 2d 432 (1974).

2. Application Of The Exclusionary Rule To Evidence Seized Illegally By School Employees Would Deter Misconduct On The Part Of The Police

In addition to deterring Fourth Amendment violations by school personnel, application of the exclusionary rule to the school setting will also prevent misconduct on the part of the police. If evidence improperly obtained through a school search could nevertheless be admitted into evidence in juvenile delinquency or adult criminal proceedings, there would be a natural temptation for the police to instigate teachers to make searches which would be illegal for both police and school personnel. Moreover, this type of covert cooperation would be difficult to detect and impossible to prove.

That such would be the inevitable result of an inconsistent use of the exclusionary rule was recognized by this Court in an analogous setting in *Elkins* v. *United States*, 364 U.S. 206 (1960). In abolishing the "silver platter" doctrine, under which evidence illegally seized by state law enforcement authorities was still admissible in federal prosecutions, Justice Stewart wrote:

> Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. *Id.* at 221-222.

Similarly by applying the exclusionary rule uniformly to evidence illegally obtained from students, whether seized by the police or by teachers, one strong incentive to conduct illegal searches would be eliminated. In deciding that the exclusionary rule must be extended to circumstances where evidence seized by a teacher is turned over to the police, the

Wisconsin Court of Appeals in *Interest of L.L.*, *supra* at 347, n. 1, agreed that

> Once the evidence comes into the possession of law enforcement officers and is used in court proceedings against the liberty interests of the person searched, the exclusionary rule must be available to deter prosecutions based on unlawful searches. Without such exclusions, school personnel and other government employees would become the same sort of bypass around the amendment's protections that the Court meant to close by extending the exclusionary rule to state court proceedings in *Mapp* v. *Ohio*, *supra*.

Petitioner suggests that should school authorities conduct illegal searches at the behest of the police, the courts will recognize that fact and can then apply the exclusionary rule to suppress any fruits of that search. (Brief of Petitioner at 16-17) This optimistic proposal ignores reality. It was the fact that such subterfuge was virtually impossible to detect that prompted the decision in *Elkins* v. *United States*, *supra*. Only the enforcement of a uniform standard pursuant to which both the police and the school authorities would be sanctioned by exclusion of evidence illegally obtained would a resurrection of the "silver platter" doctrine be avoided.

Significantly, petitioner does not challenge the efficacy of the exclusionary rule with regard to the police. However, as *amicus curiae*, the Washington Legal Foundation suggests, based upon the research embodied in Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970) (hereinafter *Oaks*), and Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. of Leg. Stud. 243 (1973) (hereinafter *Spiotto*) that the exclusionary rule does not deter police misconduct. (See *Amicus* Brief at 9, n. 3). This assertion is wholly unwarranted for several reasons, not the least of which is Prof. Oaks' own belief that his findings proved to be inconclusive. *Oaks* at 755.

Oaks studied arrests for narcotics, weapons, gambling and stolen property in Cincinnati, reasoning that if the exclusiona-

ry rule was deterring unlawful conduct, the number of arrests for these crimes (which generally required evidence to be seized) would decline subsequent to the *Mapp* decision. Spiotto likewise confined his study to a single city, Chicago, but focused upon the number and success of motions to suppress filed in felony cases in the trial courts. These before and after evaluations are beset with inherent weaknesses.

First, the studies centered upon a single city. As the police response in Chicago and Cincinnati can hardly be characterized as typical, these studies failed to examine an adequate or representative sample. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against A Precipitous Conclusion*, 62 Kty. L. J. 681, 698, 702, 704, 720-22 (1974) (Hereinafter *Canon*). The whole notion of analyzing statistics on supression motions as an indicator of police compliance is of questionable validity. Such a study cannot account for (1) the numerous cases that are discretionally screened out of the system by police and prosecuters who are mindful of the inevitable success of a suppression motion, (2) the fact that illegal searches which do not uncover incriminating evidence never come before judical scrutiny, and (3) the effect of population growth and social changes (increasing drug use) upon the crime rate. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States* v. *Calandra*, 69 N.W. L. Rev. 740, 744 (1974) (hereinafter *Critique*); *Canon* at 718.

Additionally, as the decision in *Mapp* only forbade the introduction of illegally obtained evidence, but left the definition of such to be determined over a decade later in piecemeal pronouncements, the *Mapp* decision cannot be considered a singular concrete event such that findings as to police misconduct beforehand would be relevant to those afterward. *Canon* at 700-01. Furthermore, the Spiotto study is subject to individual criticisms, the most glaring of which is the researcher's mistaken belief that *Mapp* imposed the exclusionary rule in Illinois, when in fact the state had adopted it pursuant to state law in 1924. *Critique* at 754.

Indeed a more credible empirical study on the exclusionary rule indicates that it does in fact deter police misconduct. Based upon information from 19 cities, Prof. Canon observed a dramatic decrease in the number of arrests for "search and seizure sensitive" crimes after *Mapp* in approximately half of those cities; a substantial increase in the number of search warrants obtained; and the wide-spread adoption by police departments of policies designed to implement the *Mapp* decision. He concluded that "the exclusionary rule can and does have a very real, although hardly universal, deterrent effect on the police." Canon, *The Exclusionary Rule: Have Critics Proven that It Doesn't Deter Police?*, 62 Judicature 398, 400 (1979).

The application of the exclusionary rule to illegal school searches would, then, serve a second deterrent purpose by preventing misconduct on the part of the police.

3. The Societal Costs Of Implementing The Exclusionary Rule Are Insubstantial

Petitioner argues that enforcing the exclusionary rule would impose "a stiff societal cost" in that the prosecution would lose the use of evidence that would otherwise be probative and reliable. (Petitioner's Brief at 19) At the outset, it must be emphasized that the enforcement of a host of constitutional rights entails the same cost. The remedy for a denial of the Sixth Amendment's right to a speedy trial is the dismissal of the indictment, despite the fact that the prosecution may have overwhelming evidence, untainted by the constitutional violation, of the defendant's guilt. *See Barker* v. *Wingo*, 407 U.S. 514 (1972). Confessions taken in violation of the Fifth Amendment are excluded, even when circumstances demonstrate that the statement is trustworthy. *See Watts* v. *Indiana*, 338 U.S. 49, 50, n. 2 (1949); *Spano* v. *New York*, 360 U.S. 315, 320-21 (1959). Nullification is the most frequently imposed sanction for constitutional violations. Dellinger, *Of rights and Remedies: The Constitution as a Sword*, 85 Harv. L.Rev. 1532

(1972). As the New Jersey Supreme Court noted below, "law enforcement would be easier without the Constitution, but that is not the way the Framers chose." *State in the Interest of T.L.O., supra* at 942.

In the Fourth Amendment context, the cost is for the prosecution to do without evidence it would never have had if constitutional principles had been respected. The State is still free to continue the case based upon any other evidence it may have, independent of the illegal search. This is a far less stringent sanction than is required for a speedy trial violation where the entire prosecution is terminated.

Furthermore, empirical evidence shows that enforcement of the rule results in the dismissal of only a small minority of prosecutions. Studies have demonstrated that a low percentage of all complaints are rejected by prosecutors because of search and seizure problems. According to the independent Government General Accounting Office study of 2,804 cases handled by thirty-eight United States Attorney's Offices in 1978, search problems accounted for only 0.4% of the arrests declined for prosecution. Evidence was suppressed in only 1.3% of the cases actually filed, half of which still terminated in convictions. Comp. Gen. Rep. No. GGD-79-45, *Impact of the Exclusionary Rule on Federal Prosecutors*, 11, 13, 14 (1979).

Data developed in a recent study by the Department of Justice is consistent with the Government Accounting Office report. The study considered the effect of the exclusionary rule in state criminal prosecutions in California over a three year period. Presented by police with 520,993 felony cases, prosecutors rejected 86, 033 (16.5%), only 4,130 of which (0.8% of the total arrests) were rejected for search problems. National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California* 1 (1982). A study of 7,500 felony prosecutions in Pennsylvania, Michigan, and Illinois found that suppression motions were filed in only 5% of the cases, and granted in only 0.7%. Nardilli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am. B. Found. Research J. 3. *See also* Canon, *Ideology and Reality in Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. Tex. L. Rev. 559, 573-76 (1982); Davies, *Do Criminal Due Process Principles Make A Difference?* 1982 Am. B. Found. Research J. 247, 265.

In light of these findings, it can hardly be said that the cost to society in terms of "lost" convictions is substantial. Petitioner asserts that implementation of the exclusionary rule in the school context would exact an additional cost by deterring school authorities from taking effective action to provide a crime-free environment for learning. (Petitioner's Brief at 19) The National School Boards Association maintains that schools are being confronted with a "rising tide" of crime and that searches are a "vital tool" to combat this problem. (Brief of *Amicus Curiae* at 5). These contentions are without support.

At the outset, it appears necessary to emphasize that the holding of the New Jersey Supreme Court does not preclude school authorities from conducting searches. It merely requires that there be some reasonable grounds for doing so.

Moreover, surveys done at both the national and local levels have concluded that the incidence of crimes committed in schools by students has been on the decline since the mid-1970's. National Institute of Education (D.H.E.W.), *Violent Schools—Safe Schools: The Safe School Study Report to the Congress*, 2 (1978), ERIC #ED-175-112 (hereinafter *The Safe School Report*); L.E.A.A. National Institute of Law Enforcement and Criminal Justice, *School Crime: The Problem and Some Attempted Solutions*, 3-4 (1980), ERIC #ED-180-103 (hereinafter, *School Crime*); New Jersey Department of Education, *Final Report on the Statewide Assessment of Incidents of Violence, Vandalism and Drug Abuse in the Public Schools*, 57 (1982) (hereinafter, *New Jersey Final Report*); ERIC Clearinghouse on Educational Management/National School Boards Association, *Research Action Brief*, 2-3 (1982), ERIC

#ED-208-453 (hereinafter, *Research Action Brief*).[21] With regard to drug abuse, a recent study prepared for the National Institute on Drug Abuse by the University of Michigan's Institute for Social Research concluded that "the 1980's represent a period of leveling and decline in drug use" among high school students. N.Y. Times, Feb. 7, 1984 at C9, col. 2 (city ed.).

The Safe School Study concluded that only 8% of the nation's school were experiencing a serious crime problem. *The Safe School Report* at 2. Some researchers feel that 4% is more accurate estimate. *Research Action Brief* at 3. While these studies conclude that problems with school exist and must be addressed, the findings suggest that schools are "not the hotbed of crime and violence" that petitioner asserts. *Research Action Brief* at 3., *School Crime* at 3.

In addition, there does not appear to be any reason to believe that the rate of crime is related to the ability of school personnel to conduct searches. For example, the Safe School Study identified a number of factors consistently found in schools with a high incidence of violence: High crime rate in the school's attendance area; higher proportion of male than female students attending; junior high school age level; large school population; lack of firmness in enforcing school rules; large class size; lack of relevance of academic courses to students; students' feelings that they have little control over what happens

[21] In evaluating the findings of the reports cited herein it should be noted that they also include statistics on categories of crimes, such as vandalism, fighting, assault and arson, with which the use of a search is not normally associated. For example, the *New Jersey Final Report* indicates that between July of 1979 and June of 1981, the state's school districts reported 15,036 incidents of vandalism, 3,975 incidents of violence, and 2,212 incidents of drug abuse. *Id.* at 4. It would appear obvious that the most serious problem faced by the New Jersey schools over this period was vandalism, by an overwhelming margin. The utility of student searches to cope with this type of crime is doubtful.

to them. *The Safe School Report* at 8. As to property crimes, the study isolated these factors: High crime rate in the attendance area; high residental concentration near school premises; presence of non-student youth around school premises; unstable family conditions; large school size; lax rule enforcement; lack of coordination between faculty and administration; hostile and authoritarian attitudes on the part of teachers toward students; low student identification with teachers as role models; manipulation of grades as a disciplinary measure; intense competition for grades; intense competition for student leadership positions. *Id.* Many of these same problem areas have been identified by other studies. *See e.g.* Governor's (Mich.) Task Force, *School Violence and Vandalism Report* (1979), ERIC #ED-191-946 (hereinafter *Michigan Report*); *New Jersey Final Report* at 57; California State Department of Education, *Preliminary Report on Crime and Violence in the Public Schools* (1981), ERIC #ED-208-567; New Jersey School Boards Association, *School Violence Survey* (1977), cited in *Research Action Brief* at 3.

None of these studies found the infrequency of student searches to be a significant factor in schools with a serious crime problem. Moreover, of the many remedial measures proposed by these studies to reduce the existing crime rate, none involved increasing the intensity of student searches. On the contrary, the findings would seem to suggest that several of the conditions which are associated with a high crime rate could actually be exacerbated by an increase in the number of searches conducted, and by the failure to stringently penalize school personnel who conduct unreasonable searches.

The Safe School Study concluded that the incidence of crime is high in schools where "students feel they have little control over what happens to them," and where there are "authoritarian attitudes on the part of teachers toward students." *The Safe School Report* at 8. *See also The Michigan Report* at 10. It was found that "fairness in the administration of discipline and respect for students is a key element in the effective governance of schools," and that "close personal ties between teachers

and students" lower the risks of criminal conduct. *The Safe School Report* at 9. *See also* Clark, *Violence in Public Schools: The Problem and Its Solutions*, 8 (1978), ERIC #ED-151-990. Frequent searches of students, particularly where no reasonable basis exists justify the search, will not engender respect between educators and students, and will only increase the students' perception that they have no control over what happens to them. Failure to stringently sanction teachers who conduct illegal searches will only persuade students that enforcement of rules is inconsistent and unfair, and that adults are privileged to flout the rules with impugnity.

It has been recognized that children have a greater need for protection against invasions of privacy than adults, and are more likely to suffer psychological damage when subjected to involuntary searches. *People* v. *Scott, D.*, *supra*, 34 N.Y. 2d at 490; *Jones* v. *Latexo Ind. School Dist.*, *supra* at 233-34; *Bellnier* v. *Lund*, *supra* at 53. As one commentator noted;

> This possibility of harm is even more ominious since the innocent as well as the guilty suffer from unreasonable searches. One example of this is the case in which an entire fifth grade class was strip searched after one student told the teacher three dollars were missing from a coat pocket [See *Bellnier* v. *Lund*, *supra*]. The indignity and trauma created by the search was fruitless; no money was found. *The Torturable Class* at 731.

In light of these circumstances, the societal costs of applying the exclusionary rule in the school context will not outweigh the deterrence benefits.

D. Failure To Apply The Exclusionary Rule To Searches By School Personnel Would Leave Students With No Adequate Means Of Preventing Violations Of Their Fourth Amendment Rights

The Fourth Amendment merely defines the right of the people to be free of unreasonable searches and seizures. It is not self-executing. Some means must be devised by the courts to effectuate its guarantees, since it is manifest that a right without a remedy has no substance. *Mapp* v. *Ohio*, *supra* at

655. In the years between 1949 when *Wolf* v. *Colorado*, *supra*, applied the Fourth Amendment, but not the exclusionary rule to the states, and 1962, when *Mapp* made the exclusionary rule mandatory, the states were free to develop and implement any alternative remedies that would adequately protect the Fourth Amendment rights of its citizens. It was the failure of the states to do so that led to the decision to require application of the rule.[22] *Mapp* v. *Ohio*, *supra* at 651-52. The inability or unwillingness of the states to devise an alternative suggests that no adequate substitute could be formulated, and that the exclusionary rule, with whatever its attendant problems, was found to be the most effective means available.

Petitioner nevertheless suggests, as alternatives, the bringing of civil suits against the offending school employee, and/or the use of internal disciplinary sanctions by the school system itself. (Petitioner's Brief at 17-18). These procedures have been found to be wholly inadequate with regard to the police, and petitioner has demonstrated no basis to conclude that they would be more successful in the school context.

1. Civil Suits Against School Employees Who Conduct Illegal Searches Would Have Inadequate Deterrent Effect

The alternative of a civil suit against the offending officer has long been recognized as an inadequate substitute for the exclusionary rule with regard to deterring police misconduct. *Elkins* v. *United States*, *supra* at 220. In his dissent to *Wolf* v. *Colorado*, 338 U.S. 25, 42-43 (1949), Justice Murphy recognized that the traditional tort action presented so many difficulties in the search and seizure context that it would rarely be successful, and would therefore have little deterrent effect. In some jurisdictions, no such cause of action would exist unless

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[22] Prior to the *Mapp* decision, 26 states had voluntarily adopted the exclusionary rule as the required method of deterring Fourth Amendment violations. See *Elkins* v. *United States*, *supra*, Appendix Table I.

physical harm could be demonstrated, and in any event the measure of damages would be the extent of the injury.[23] *Id.* To obtain punitive damages, malice must be proved, and the resulting award may be only nominal. *Id.* In the event of victory, the plaintiff may have difficulty in collecting damages from frequently "judgment-proof" officers. *Id.* at 44.

The possible federal remedies present a substantial barrier in the form of a qualified immunity available to government officials as defenses when they have acted in "good faith." See *e.g.*, *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); 42 U.S.C. § 1983. Moreover, it has been found that in this type of action, juries tend to focus upon the officer's belief in the legality of his conduct, and ignore the question of whether his belief was reasonable. Theis, *Good Faith as a Defense to Suits for Police Deprivation of Individual Rights*, 59 Minn. L.Rev. 991, 1009-12 (1975); Comment, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 Temp. L.Q. 938, 951-953 (1976).

A number of other factors have also been recognized as rendering the civil alternative ineffective. Fear of reprisals from the police and prosecutorial agencies discourages both plaintiffs and their attorneys from bringing such suits. Amsterdam, *Prospectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 430 (1974). Plaintiffs also face the likelihood of jury prejudice in favor of the law enforcement officer, particularly if the plaintiff is himself a member of a minority group. Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 783, 800 (1979).

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[23] The absence of physical harm in suits alleging Fourth Amendment violations has resulted in low damage awards. Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 789-90 (1979); Comment, *Presumed Damages for Fourth Amendment Violations*, 129 U.Pa. L.Rev. 192 (1980).

The cost of litigating such suits is prohibitive, and because of the dim prospects of success, the availability of contingent fee representation is unlikely. Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. Crim. L. and P.S. 1, 7 (1975). Moreover, many victims of unconstitutional searches are unaware that the officer's conduct was illegal and actionable. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States* v. *Calandra*, 69 N.W.U.L. Rev. 790, 793 (1974).

All of these practical problems, identified in the context of civil suits against the police would have equal application to suits against school officials. Families would be hesitant to bring such suits while their children were still students under the jurisdiction of the defendants. The fear, and the likelihood, of reprisals would be as great if not greater in the educational context than with the police.

Juries could be expected to have the same sympathies for educators as they have historically held for law enforcement personnel. The children, and as a practical matter, their parents, would still have to have substantial financial resources to conduct the civil litigations. *Smyth* v. *Lubbers*, *supra* at 794. The probability of collecting money damages from judgment-proof school employees would be no better than from police officers. Moreover, children are even less likely than adults to understand when their rights have been violated and to realize that they can seek redress.

Furthermore, teachers and school administrators also have a qualified immunity from damages for claims of constitutional violation stemming from their "good faith" actions. See *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Morales* v. *Grigel*, 422 F.Supp. 988, 1001 (D.N.H. 1976). Thus, in all but the most flagrant violations of a student's personal privacy, a teacher

could successfully defend on the grounds that though the search was illegal, he or she had acted in good faith.[24]

These difficulties would, then, render the civil action an inadequate substitute for the exclusionary rule in the educational context. Certainly, the appellant has demonstrated no reason to assume that it would be any more effective a deterrent to illegal searches by teachers than it has been found to be to police officers. Indeed, after considering the difficulties inherent in bringing a civil suit in these circumstances, it has been recognized that without the exclusionary rule, school authorities "would be free to trench upon constitutional rights of the students in their charge without meaningful restraint or fear of adverse consequences." *Jones* v. *Latexo Ind. School Dist.*, *supra*, at 239; *Smyth* v. *Lubbers*, *supra* at 794.

2. Administrative Sanctions Against The Offending School Employee Could Not Be Sufficiently Enforced To Serve As An Effective Deterrent To Constitutional Violations

The use of sanctions against the individual who conducted the illegal search has also been proved to be an unsuccessful deterrent in the law enforcement context. The record of American search and seizure litigation strongly suggests that most breaches of the Fourth Amendment occurred if not at the explicit command, at least with the tacit approval, of the supervisors of the individuals carrying out the search. Edwards, *Criminal Liability for Unreasonable Search and Seizure*, 41 Va.L.Rev. 621, 628 (1955) (hereinafter *Edwards*) Under these

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[24] Even with regard to such an extreme invasion of personal privacy as a strip search, the good faith immunity has been successfully asserted by a teacher in defense to a 42 U.S.C. 1983 action. In *Bellnier* v. *Lund*, *supra*, the District Court ruled that the law in the area of school searches was sufficiently unsettled that the defendant was immune from damages from her unlawful strip search of an entire class of fifth graders. *Compare Doe* v. *Renfrew*, *supra*, 631 F.2d at 91; *M. M.* v. *Anker*, *supra*, 477 F.Supp. at 837.

circumstances, those in authority would be more likely to protect an overzealous subordinate than to recommend criminal or administrative sanctions. *Id.*; *Franks* v. *Delaware*, 438 U.S. 168, 169 (1978); *Wolf* v. *Colorado*, *supra* at 42. Reported decisions reflecting that such penalties have been imposed are almost non-existent. *Edwards* at 629.

Such results could be expected in the educational context as well. If internal disciplinary procedures are never utilized, they can hardly serve any deterrent function. Moreover, as one commentator has suggested with regard to the police, if the alternative of personal sanctions could somehow be made to work effectively, the end result would likely be too much deterrence:

> Critics of the exclusionary rule who would replace it with sanctions aimed directly at the offending officer often miss the point that if such sanctions were viable, they would deal a more crippling blow to law enforcement than does the mere exclusion of illegally-seized evidence . . . Under threat of sanctions imposed directly on the individual officer, . . . officers may forbear from acting, even when they think they have the right, for fear that those who review their actions will disagree. This additional deterrence at the margin is an unnecessary social cost.
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> *Mertens and Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Geo. L.J. 365, 408-09 (1981).

See also Edwards at 695; *Dellinger* at 1555.

In view of the small likelihood that personal sanctions would be imposed, and the problems that could be engendered even if such an approach could be effectively implemented, this proposed alternative is an inadequate substitute for the exclusionary rule.

E. In Addition To Deterring Violations Of The Fourth Amendment The Exclusionary Rule Is Constitutionally Required To Protect Judicial Integrity

Petitioner's argument that the exclusionary rule should not be applied to illegally conducted school searches is based upon

the contention that the sole purpose of this remedy is deterrence of future misconduct. Such was not, however, the historic basis upon which this rule was founded. In *Weeks* v. *United States*, *supra*, when this Court ruled that evidence seized in violation of the Fourth Amendment would be inadmissible in federal trials, the deterrence rationale was not mentioned.[25] Instead the unanimous Court held that:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. *Id.* at 392.

See also *Olmstead* v. *United States*, 277 U.S. 438 (1928).

This justifiation, which has been labeled the "judicial integrity" [*Elkins* v. *United States*, *supra* at 222] rationale, was described thusly in *Terry* v. *Ohio*, 392 U.S. 1, 13:

> Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur . . . When [unconstitutional] conduct is identified, it must

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[25] Petitioner erroneously asserts that the exclusionary sanctions imposed in *Weeks*, *supra*, were intended for deterrent purposes. (See Petitioner's Brief at 9). Deterrence was not mentioned as a basis for the exclusionary rule until *Wolf* v. *Colorado*, *supra*.

> be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

Thus it is not merely the illegal seizure of evidence which the Fourth Amendment condemns, but its use as part of an evidentiary transaction commencing with the search and continuing through the prosecutor to the Court itself.

Since deterrence was first mentioned in *Wolf* v. *Colorado*, *supra*, as a supporting basis of the exclusionary rule, its theoretical importance has, admittedly, increased. See *e.g. United States* v. *Calandra*, *supra*; *United States* v. *Janis*, 428 U.S. 433, 458-59, n. 35 (1976). Neverless, it cannot be said that this Court has abandoned the imperative of judicial integrity. In *United States* v. *Johnson*, *supra*, this Court rejected the contention that deterrence forms the sole criteria for the applicability of the exclusionary rule. Retroactive effect was given to the decision in *Payton* v. *New York*, 445 U.S. 573 (1980) requiring police officers to obtian a warrant in order to arrest a suspect in his home, a point upon which the law had previously been unsettled. The decision to apply the *Payton* rule retroactively could hardly have been compelled by the need to deter future police misconduct. Reliance was instead placed upon the judicial integrity rationale as formulated by Justice Harlan in his dissent to *Desist* v. *United States*, 394 U.S. 244 (1969):

> We so not release a criminal from jail because we like to do so or because we think it is wise to do so, but only because the Government has offended constitutional principle in the conduct of this case. *United States* v. *Johnson*, *supra*, 102 S.Ct. at 2594, quoting *Desist* v. *United States*, *supra* at 258.

Similarly, during the course of this Court's opinion in *United States* v. *Payner*, 447 U.S. 727 (1980), Justice Powell reaffirmed that the exclusionary rule serves the twofold prupose of deterring illegality and protecting judicial integrity. *Id.* at 734, n.8.

Despite the growing emphasis upon deterrence, this Court has not relinquished the older imperative of judicial integrity.

Indeed as previously set forth in Point IIB, *supra*, the concern with the deterrent effect of the exclusionary rule has predominated only in proceedings ancillary or collateral to a criminal trial. Thus far, this Court has not allowed illegally seized evidence to be introduced on the prosecution's case-in-chief against the victim of the search. Such is the position the petitioner presently urges upon this Court. To do so would strike at the heart of the principle of judicial integrity, and render the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *See Elkins* v. *United States*, *supra* at 222-23.

F. The Exclusionary Rule Serves A Constitutionally Prescribed Educational Function Most Appropriately Served In The Public School Context

The exclusionary rule has been recognized, in the context of the police, to serve an educative function:

> More importantly, over the long term, this demonstration [the suppression of evidence secured by illegal searches] that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law-enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system. *Stone* v. *Powell*, 428 U.S. 465, 493 (1976).

As was long ago observed by Justice Brandeis, "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the Government becomes a lawbreaker, it breeds contempt for the law . . ." *Olmstead* v. *United States*, *supra* at 484-85 (1928) (dissent).

Surely the educative purpose of the exclusionary rule is more appropriately served in the school setting than in any other aspect of society. *Jones* v. *Latexo Ind. School Dist.*, *supra* at 239. "Students look to teachers, school administrators and others in positions of authority as models for their own behavior and development into responsible adults." *Id.* It

would be ironic in the extreme if in our schools, the institution upon which we rely to teach our children the rights and responsibilties of our constitutional form of government, violations of those rights are countenanced rather than met with the most stringent remedies available. "[H]ow can teachers serve as models for behavior if they disobey the law?" Koff, *Coping with Disruptive Students*, 63 Nat'l Assoc. of Sec. Sch. Principals Bull. 8, 14 (Feb. 1979).

The special educational significance of the Fourth Amendment in the school setting was eloquently expressed by Justice Brennan in his dissent from the denial of *certiorari* in *Doe* v. *Renfrew*, *supra*, 451 U.S. at 1022, a case in which the entire student body of a secondary school was subjected to searches by specially trained dogs:

> We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant *certiorari* to teach petitioner another lesson: that the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been or is being committed. Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedom.

If, as a result of the decision in the instant matter, students are accorded Forth Amendment rights, but are denied any adequate means of protecting those rights, this Court will have effectively taught them "to discount important principles of our government as mere platitudes." *See West Virginia State Bd. of Education* v. *Barnette*, *supra* at 637

CONCLUSION

For the foregoing reasons, respondent respectfully requests that certiorari be dismissed, or in the alternative, that the decision of the Supreme Court of New Jersey be affirmed.

Respectfully submitted,

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